

87-1143

NO. _____

Supreme Court, U.S.
FILED

DEC 18 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, 1987

TOM HOLLIS, JR.

PETITIONER

-v-

CAMPBELL COUNTY (KENTUCKY) DISTRICT COURT

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

C. THOMAS HECTUS
635 West Main Street
Fourth Floor
Louisville, KY 40202
(502) 585-2100

36 p2

QUESTION PRESENTED FOR REVIEW

I.

MAY A FEDERAL COURT, IN REVIEWING THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A STATE COURT CRIMINAL CONVICTION, IGNORE STATE LAW WHICH SETS A STRICTER STANDARD OF PROOF FOR SCIENTER THAN THAT MANDATED BY THIS COURT IN HAMLING V. UNITED STATES?



TABLE OF CONTENTS

<u>ITEM</u>	<u>PAGE</u>
Question Presented.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Opinion Below.....	1
Jurisdiction.....	1
Constitutional Provisions Involved.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT....	8

THE COURT OF APPEALS FAILED TO
REVIEW THE SUFFICIENCY OF THE
EVIDENCE IN PETITIONER'S CASE
UNDER RELEVANT KENTUCKY LAW,
WHICH SETS A MORE STRICT
SCIENTER STANDARD THAN THAT
REQUIRED BY THIS COURT IN
HAMLING V. UNITED STATES.

CONCLUSION.....	16
APPENDIX	



TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Hamling v. United States</u> , 418 U.S. 87, 123 (1974).....	12
<u>Harris v. United States</u> , 404 U.S. 1232, 1233, 92 S.Ct. 10, 12 30 L.Ed.2d 25 (1971).....	10
<u>In Re Winship</u> , 397 U.S. 366, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).....	10
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	11
<u>Johnson v. Florida</u> , 391 U.S. 596, 88 S.Ct. 1713, 20 L.Ed.2d 838 (1968).....	9
<u>Keene v. Commonwealth</u> , Ky., 516 S.W.2d 852, 855 (1974).....	14
<u>Patterson v. New York</u> , 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).....	14



<u>CASES:</u>	<u>PAGE</u>
<u>Smith v. California</u> , 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).....	11
<u>Thompson v. City of Louisville</u> , 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).....	9
<u>Vachon v. New Hampshire</u> , 414 U.S. 478, 94 S.Ct. 664, 665, 38 L.Ed.2d 666 (1974).....	10



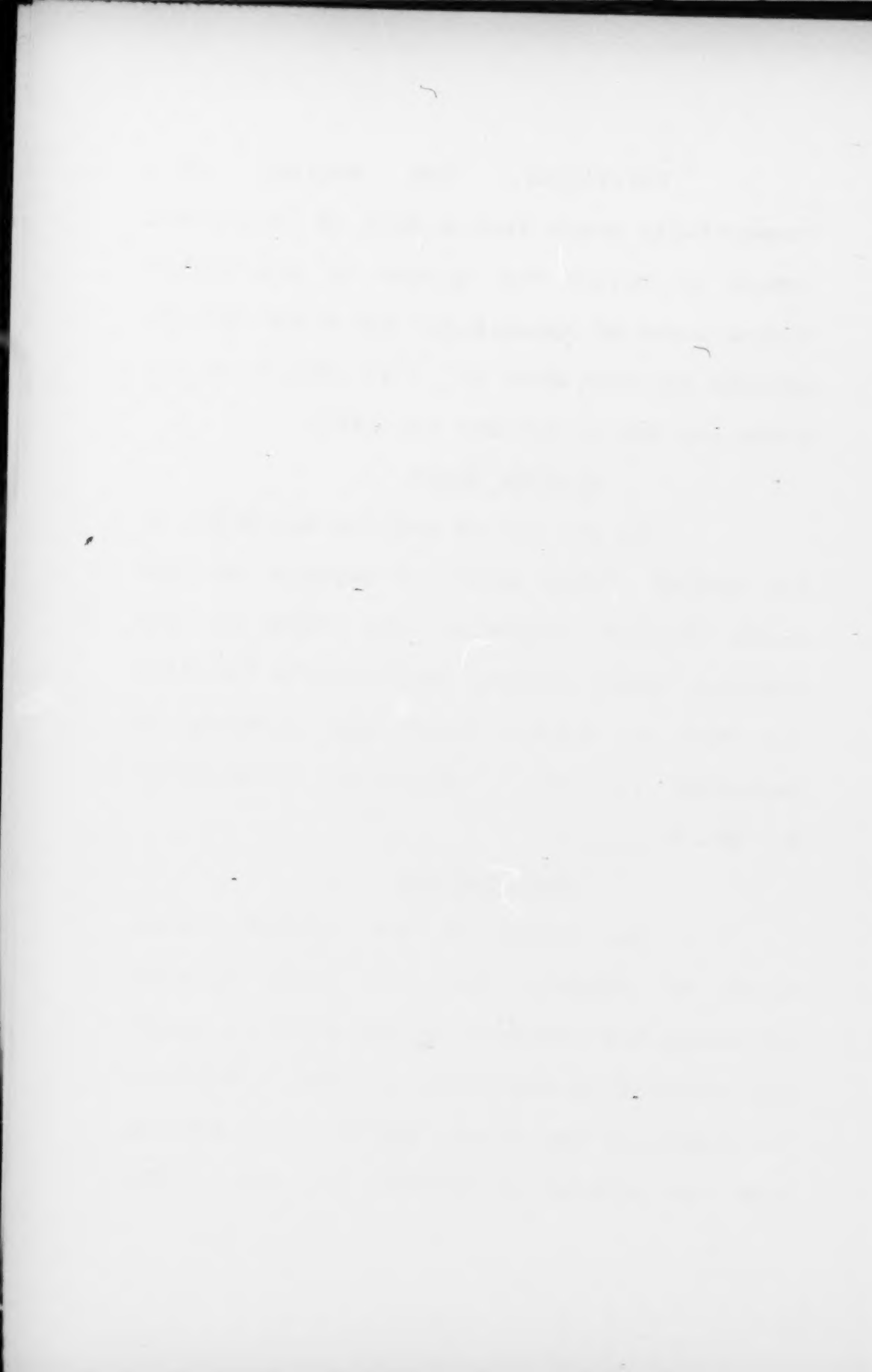
Petitioner, Tom Hollis, Jr., respectfully prays that a Writ of Certiorari issued to review the Opinion of the United States Court of Appeals for the Sixth Circuit entered on September 11, 1987 [Petition for Rehearing denied October 13, 1987].

OPINION BELOW

The Per Curiam Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming the Order of the District Court denying Petitioner's Petition for Writ of Habeas Court was rendered on September 1, 1987. [Appendix, hereinafter A., pp. 1-____].

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the District Court was rendered on September 1, 1987. Petition for Rehearing was filed, and an Order denying same was entered on October 13, 1987. The



- jurisdiction of this Court is invoked
pursuant to 28 U.S.C. §1254(1).



CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

No person shall...be deprived of life, liberty, or property, without due process of law....



STATEMENT OF CASE

On July 12, 1980, the Kentucky State Police executed a search warrant for the premises known as the Cinema X Theater located in Newport, Campbell County, Kentucky. They seized, inter alia, two movies having no titles, but described as the "Detective Movie" and the "Antique Shop Movie." (Ken Soard at TR 2-5, 14-18; Verst Closing Argument at TR 140).

Two corporations, Brown Bear, Inc. and Combined Entertainment Ventures, Ltd., along with Petitioner Tom Hollis, Jr. were charged with the offense of facilitating the distribution of obscene matter.

Evidence was introduced that Brown Bear, Inc. was the owner of the property located at 716 Monmouth Street, Newport, Campbell County, Kentucky, known as the Cinema X Theater, and had operated this facility for a number of years. (Irma Clark at TR 86-87). In 1978, Brown Bear was

convicted of distributing obscene material. (Colloquy between Court and Counsel, TR pp. 38-47). Thereafter, Happy Day, Inc. took over the operation of the theater. (Irma Clark at TR pp. 51-60; 64-65).

In April, 1980, Combined Entertainment Ventures, Ltd., a Kentucky corporation, purchased and acquired the contents and business of the Cinema X Theater, and was the sole corporate entity in charge of operating the theater. (Irma Clark at TR 58-60; 81-82).

The Commonwealth introduced into evidence a written contract for services entered into by Tom Hollis, Jr. and Brown Bear, Inc. (Commonwealth's Exhibit 7-A, TR at 96; JA at 34-35). Hollis was to be paid an hourly rate for bookkeeping services. He was to be reimbursed for any reasonable expenses incurred in the performance of his duties. [Id]. Under the terms of contract, he was required to pay all bills, including taxes or

other assessments concerning the operations of the business. His name appeared as the Signatory on the corporation's bank accounts, specifically designated as "Tom Hollis, Jr., Cashier" and "Tom Hollis, Jr., Accountant." (Irma Clark at TR 48-54; Ben Courtney at TR 118-122). He was also permitted to hire or discharge any employee whose job included handling monies taken in by the business, but subject however to the requirement that the local manager of said business must consent to the action taken by Hollis. (Commonwealth's Exhibit 7-A, TR at 96; JA at 34-35).

On avowal, Ken Soard, a Kentucky State Police Officer, testified that, based upon his investigation, he had no knowledge that Tom Hollis, Jr. assisted in the publication or exhibition of either the Detective Movie or the Antique Shop Movie. (Ken Soard at TR 30-31). Further, based upon his investigation, Trooper Soard had no

knowledge that Hollis was aware of the character and content of the movies. (Id at 32). In fact, he had no knowledge that Hollis assisted or aided the corporate Defendants in any manner with regard to the exhibition and distribution of the subject films. (Id at 32-33).

There was no evidence presented that Hollis had ever been inside the Cinema X Theater, or that he had any knowledge of the exhibition or content of the two films in question.

Hollis' motion for directed verdict of acquittal based upon the insufficiency of the evidence was overruled.

The jury returned a verdict finding Hollis guilty of facilitation to distribute obscene matter. He was sentenced to 90 days in the County Jail. On April 4, 1981, the Campbell County District Court entered final Judgment. (Judgment and Order of the

The first thing I saw when I stepped out of the car was a
cold, biting wind that seemed to come from everywhere.
The air was thick with a heavy mist that hid the trees
and the distant hills. I had heard that the weather was
awful, but I didn't realize it would be this bad. The
ground was covered in a layer of frost, and the trees
were bare and dark against the grey sky. I took a deep
breath and tried to ignore the discomfort. I was here
for a reason, and I had to make the most of it. I walked
towards the old stone building that was supposed to be the
main house. The path was uneven and slippery, and I had to
be careful not to fall. The building was made of rough-hewn
stone and had a steep, gabled roof. It looked like it had
been there for a long time. I went inside and found a
large, empty room with a fireplace. The fire was not lit,
but I knew it would be warm when it was. I sat down on
a wooden bench and looked out the window. The view was
beautiful, but also a little scary. The trees were tall and
thin, and the mist was so thick that I could barely see
the other side of the road. I shivered and wrapped my
coat around myself. I had to stay here for a while, and
I had to make the best of it. I took a deep breath and
tried to ignore the discomfort. I was here for a reason,
and I had to make the most of it. I walked towards the
old stone building that was supposed to be the main house.
The path was uneven and slippery, and I had to be careful
not to fall. The building was made of rough-hewn stone and
had a steep, gabled roof. It looked like it had been there
for a long time. I went inside and found a large, empty
room with a fireplace. The fire was not lit, but I knew
it would be warm when it was. I sat down on a wooden
bench and looked out the window. The view was beautiful,
but also a little scary. The trees were tall and thin, and
the mist was so thick that I could barely see the other
side of the road. I shivered and wrapped my coat around
myself. I had to stay here for a while, and I had to make
the best of it. I took a deep breath and tried to ignore
the discomfort. I was here for a reason, and I had to make
the most of it. I walked towards the old stone building
that was supposed to be the main house. The path was
uneven and slippery, and I had to be careful not to fall.
The building was made of rough-hewn stone and had a steep,
gabled roof. It looked like it had been there for a long
time. I went inside and found a large, empty room with a
fireplace. The fire was not lit, but I knew it would be
warm when it was. I sat down on a wooden bench and
looked out the window. The view was beautiful, but also a
little scary. The trees were tall and thin, and the mist was
so thick that I could barely see the other side of the road.
I shivered and wrapped my coat around myself. I had to
stay here for a while, and I had to make the best of it.
I took a deep breath and tried to ignore the discomfort.
I was here for a reason, and I had to make the most of it.

Campbell Co. (Kentucky) District Court, filed 4/30/81; JA at 21-22).

Thereafter, Hollis appealed to the Campbell Circuit Court, which affirmed his conviction. He then filed motions seeking discretionary review in the Court of Appeals of Kentucky and Supreme Court of Kentucky, as well as a petition for certiorari in the United States Supreme Court. All were denied.

In August, 1984, Hollis filed his Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Kentucky at Covington. (R. 1, Petition for Writ of Habeas Corpus, p. 1). The Petition was denied. (R. 27, Judgment of the United States District Court). Thereafter, the Sixth Circuit Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FAILED TO
REVIEW THE SUFFICIENCY OF THE
EVIDENCE IN PETITIONER'S CASE

UNDER RELEVANT KENTUCKY LAW,
WHICH SETS A MORE STRICT
STANDARD THAN THAT REQUIRED BY
THIS COURT IN HAMLING V. UNITED
STATES.

Hollis submits that the evidence upon which the Commonwealth relied to support his conviction was entirely circumstantial, and wholly insufficient to support a guilty verdict under the Kentucky criminal facilitation statute.

It is an elementary principal of Constitutional law that "the burden . . . is on the State to prove that an accused has committed an act bringing him within a criminal statute." Johnson v. Florida, 391 U.S. 596, 88 S.Ct. 1713, 20 L.Ed.2d 838 (1968). Each essential ingredient of the crime charged must be supported by some evidence in the record. Id, 88 S.Ct. at 1715. See also Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). A conviction based on a record lacking any relevant evidence as to a

crucial element of the offense charged . . . violate[s] due process." Harris v. United States, 404 U.S. 1232, 1233, 92 S.Ct. 10, 12 30 L.Ed.2d 25 (1971); Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 665, 38 L.Ed.2d 666 (1974); In Re Winship, 397 U.S. 366, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

In the case at bar, there is no evidence to show that Hollis had any knowledge concerning the nature, content and character of the two films for which he was convicted. For that reason, his conviction is fatally flawed.

Under federal constitutional standards, unless the person charged has personal knowledge, actual or constructive, of the nature, content and character of the materials at issue, he cannot be convicted. To hold otherwise would amount to strict liability, a concept disfavored by American criminal jurisprudence. In Smith v.



California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), this Court held that a state may not hold a person strictly liable for the sale of obscene material.

In a later decision, this Court stated regarding the element of scienter that:

It is constitutionally sufficient that the prosecution show that the defendant had knowledge of the contents of the material he distributes, and that he knew the character and nature of the materials. Hamling v. United States, 418 U.S. 87, 123 (1974).

Hollis does not issue with the relevant federal standard of proof regarding scienter. However, a federal court must review the sufficiency of the evidence in this case in light of the relevant Kentucky statutes, as interpreted by the Kentucky courts. Hollis submits that Kentucky law requires knowledge of the obscenity of any specific matter which is the subject of prosecution, and accordingly, the decision of this Court in Jackson v. Virginia, 443 U.S.

THE STATE OF NEW YORK
IN SENATE
JANUARY 1, 1890.
REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1889.

ALBANY:
PUBLISHED BY THE
UNIVERSITY OF THE STATE OF NEW YORK,
1890.

THE STATE OF NEW YORK
IN SENATE
JANUARY 1, 1890.
REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1889.

307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires federal review to determine the sufficiency of the evidence to prove Hollis' knowledge of the obscenity, not simply the general character and nature, of said matter.

In its opinion, the Court of Appeals found that "a rational trier of fact could properly have found that Mr. Hollis knew what kind of business Cinema X was engaged in and knew the character and nature of the films he was procuring for Cinema X."¹ [Opinion of the Court, p. 4 (Emphasis Added)]. The Court of Appeals relied upon the decision of this Court in Hamling v. United States, 418 U.S. 87 (1974), for the proposition that "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of

¹ Hollis contests the suggestion that he "procured" the films which were the subject of the prosecution below. The only evidence was that Hollis wrote checks for the films. The only inference from this evidence is that Hollis merely paid invoices, and not that he ordered films in advance of payment (i.e., that he "procured" the films).

the materials he distributed, and that he knew the character and nature of the materials." Hollis agrees that the decision in Hamling sets the minimum standards for the protection afforded by the First Amendment to the Federal Constitution. Needless to say, however, the states are free to set their own standards, as long as a state does not infringe upon the minimum constitutional protections set by this Court.

In this case, Hollis submits that Kentucky has a higher standard for conviction than that required in a federal prosecution. Federal inquiry should not stop then at whether the minimum federal requirements are met. Rather, Hollis contends that because the Commonwealth of Kentucky has defined the offense of distribution of obscene matter in such a way as to require, as an element of the offense, that he knew of the obscenity of the material (rather than simply a more general knowledge of "the character and

nature" of the material), then the state is obligated, as a matter of the federal constitutional requirement of due process of law, to prove that requirement beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Simply put, if the Commonwealth of Kentucky requires proof of knowledge of the obscenity of the materials in a prosecution for distributing, then this Court must, as mandated by the due process clause of the Fourteenth Amendment, ensure that the state did prove that element. Patterson v. New York, *supra*; Jackson v. Virginia, *supra*.

In 1974, the Court of Appeals of Kentucky (now Supreme Court) held quite explicitly that Kentucky's obscenity statute "plainly requires that [the jury] must believe the defendant 'had knowledge of the obscenity of the film.'" Keene v. Commonwealth, Ky., 516 S.W.2d 852, 855 (1974) (Emphasis Added). With the enactment in 1975

...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

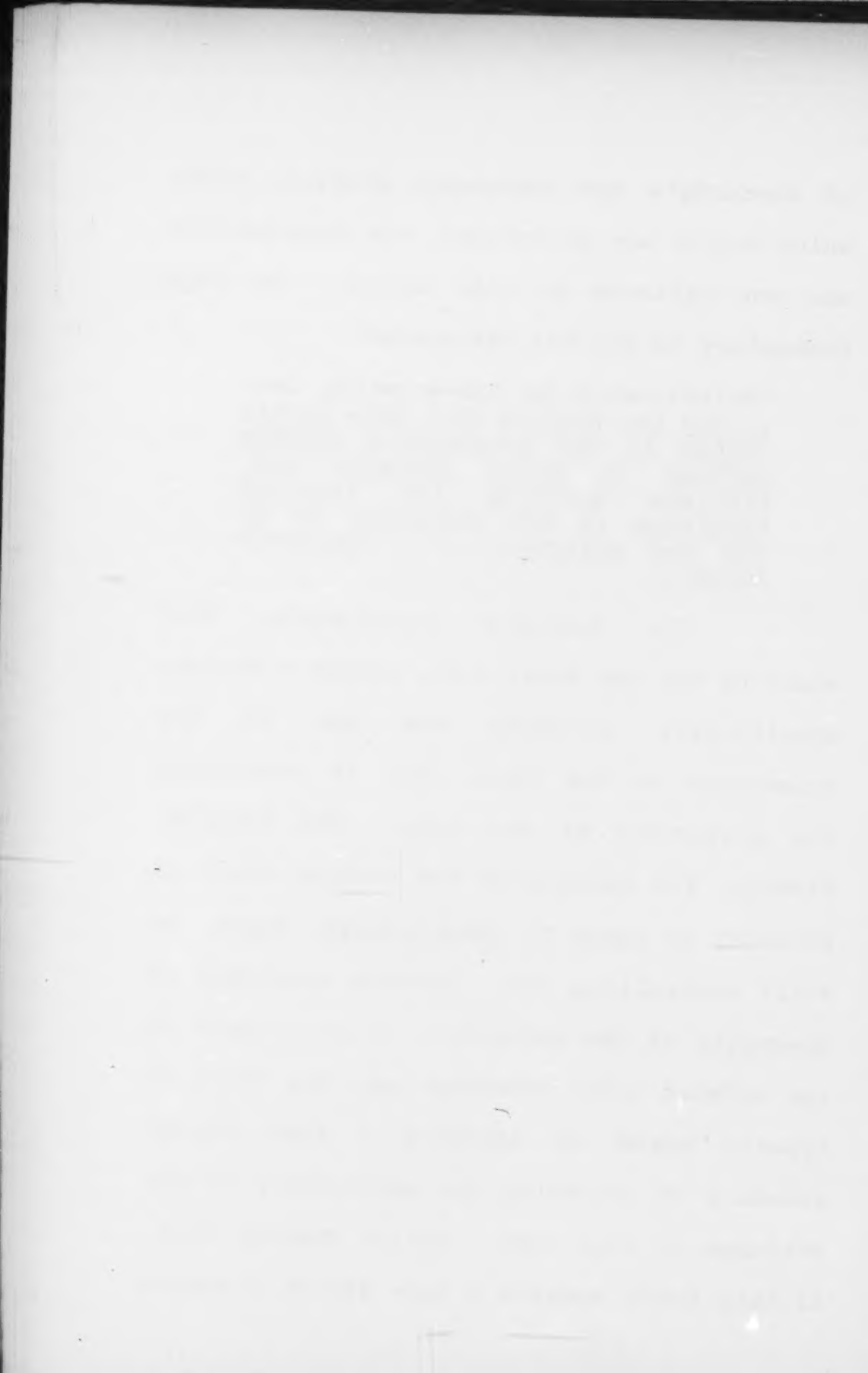
...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

of Kentucky's new obscenity statute, under which Hollis was prosecuted, the Commonwealth was not relieved of this burden. As this Commentary to KRS 531.020 states:

"Relationship to Pre-existing Law: ...the new statute will make little change in the substantive offense defined in prior Kentucky law. Previous Kentucky law required knowledge of the obscenity as do the new statutes...." (Emphasis Added).

The Kentucky Legislature, when enacting the new Penal Code, passed a statute specifically allowing the use of the commentary to the Penal Code in construing the provisions of the Code. KRS 500.100. Clearly, the opinion of the highest court of Kentucky in Keene v. Commonwealth, supra, is still controlling law. Because knowledge of obscenity of the materials, is an element of the offense under Kentucky law, the Court of Appeals erred in applying a less strict standard in reviewing the sufficiency of the evidence in this case. Hollis submits that, if this Court applies a more strict standard



as set out under Kentucky Law, his conviction must fall. However, nowhere in the Opinion of the Court of Appeals is there any reference to Kentucky law, nor any indication that the Court reviewed the sufficiency of the evidence in this case according to the elements as defined by Kentucky's highest courts. On the contrary, the Opinion clearly rests on less strict federal standards.

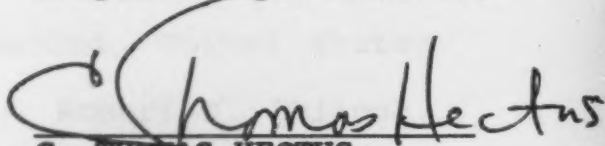
CONCLUSION

Petitioner respectfully requests this Court to grant this Petition and to review the Opinion of the Court of Appeals in this case. Further, Petitioner respectfully requests this Court to reverse the decision of the Court of Appeals, and to enter an Order remanding this case to the District

7

Court with directions to grant Petitioner's
Petition for Writ of Habeas Corpus.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "C. Thomas Hectus". The signature is written in a cursive style with a large, looping initial "C".

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Fourth Floor
Louisville, KY 40202
(502) 585-2100

COUNSEL FOR PETITIONER
MEMBER OF THE BAR OF THE
UNITED STATES SUPREME
COURT

DATE AND SIGNATURE OF THE

PERSON TO WHOM THE

PROPERTY IS TRANSFERRED

[Signature]

TO HAVE AND TO HOLD
TO THE SAID PERSON
ALL THAT CERTAIN
PARCELS OF LAND
TOGETHER WITH
ALL RIGHTS AND
APPURTENANCES
TO THE SAME

IN WITNESS WHEREOF
I HAVE HEREUNTO
SET MY HAND AND
SEAL OF OFFICE
AT THE CITY OF
WASHINGTON
THIS _____ DAY OF _____

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been mailed, United States Postage prepaid, to Hon. Robert V. Bullock, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, KY 40601, this the 6th day of January, 1988.


C. THOMAS HECTUS


by 

CONTENTS

A BROAD VIEW OF THE
THE HISTORY OF THE
THE HISTORY OF THE
THE HISTORY OF THE
THE HISTORY OF THE
THE HISTORY OF THE
THE HISTORY OF THE
THE HISTORY OF THE

THE HISTORY OF THE

NO. 10-1011

UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY

WASH. D. C.

1911

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

APPENDIX

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

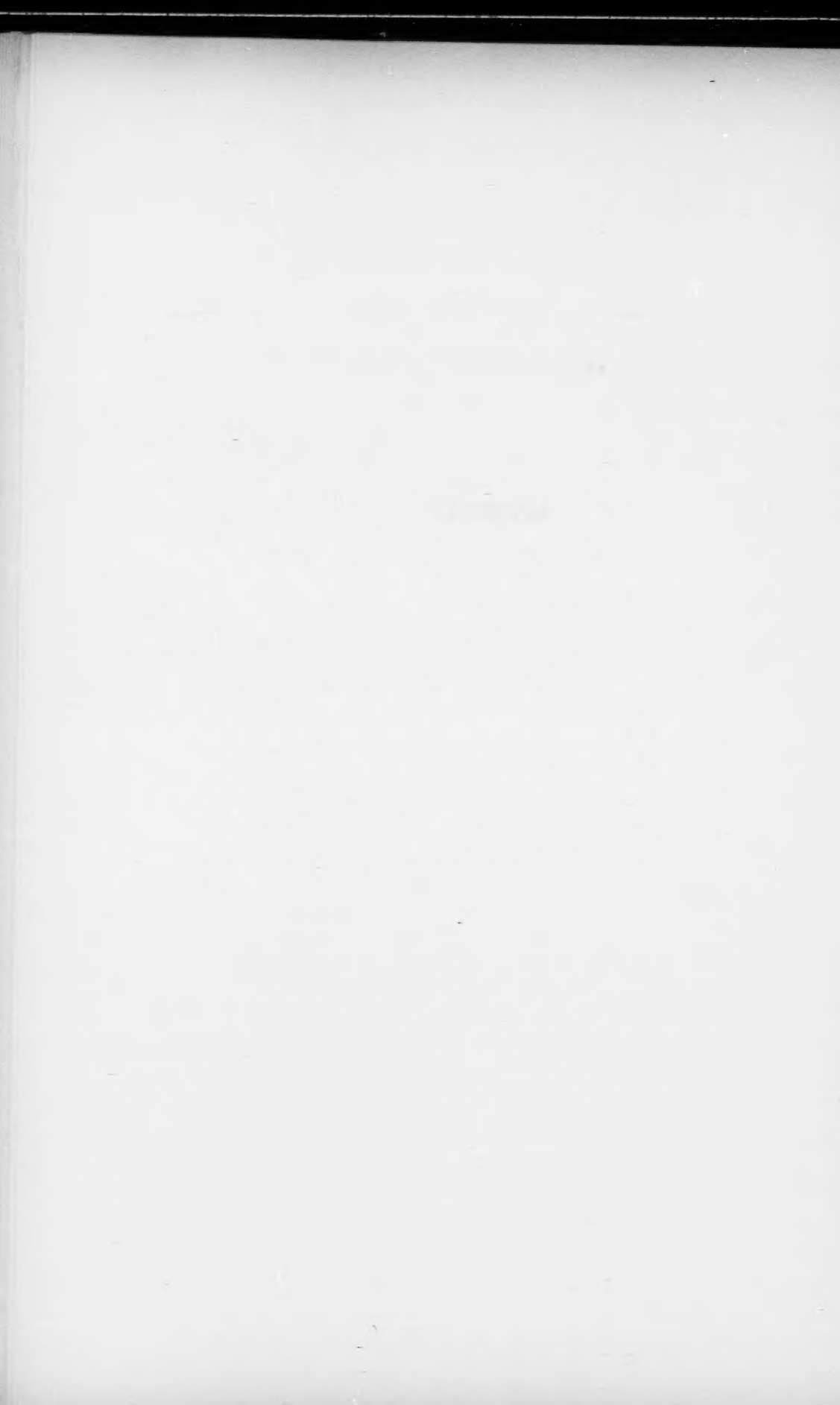
PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY

PLANT INDUSTRY



No. 86-5311

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOM HOLLIS, JR.	)	FILED
	)	SEPT 11 1987
Petitioner-Appellant,	)	JOHN P. HEHMAN,
	)	Clerk
)	
v.	)	ON APPEAL FROM
	)	THE UNITED STATES
CAMPBELL COUNTY DISTRICT	)	DISTRICT COURT
COURT,	)	FOR THE EASTERN
	)	DISTRICT OF
Respondent-Appellee.	)	KENTUCKY

Decided and Filed

BEFORE: KRUPANSKY, NELSON and RYAN, Circuit
Judges

PER CURIAM. A jury in Campbell County, Kentucky, found petitioner-appellant Hollis guilty of criminal facilitation of the distribution of obscene motion picture films. Mr. Hollis' conviction was affirmed on appeal by the Campbell County Circuit Court, and both the Court of Appeals and the Supreme Court of the Commonwealth declined to grant discretionary review. Mr. Hollis petitioned the United States Supreme Court for a writ of certiorari, but the petition was denied. Next Mr. Hollis filed a petition for a writ of

habeas corpus in the United States District Court for the Eastern District of Kentucky. A magistrate to whom the case was referred recommended that the petition be denied, and the district court adopted that recommendation. Mr. Hollis appealed to this court, contending that the district court erred in failing to accept his argument that the Kentucky courts violated his rights under the United States Constitution by allowing him to be convicted on insufficient evidence. Believing that a rational trier of fact, viewing the evidence in light most favorable to the prosecution, could have found Mr. Hollis guilty beyond a reasonable doubt, we shall affirm the judgment of the district court.

I

The case against Mr. Hollis arose out of his association with an establishment in Newport, Kentucky, called "Cinema X." As its name implies, this was a movie theater

that showed sexually explicit pictures. Two police officers went into the theater and saw several movies that they believed were obscene. The officers obtained a search warrant and seized the films, taking them away in a trash bag. Criminal charges were brought against Mr. Hollis and three corporations associated with the Cinema X operation. One of the corporations, Happy Day, Inc., was convicted of distributing obscene material. Mr. Hollis, Brown Bear, Inc. (which owned the theater and had operated it until convicted in an earlier case of distributing obscene material) and Combined Entertainment Ventures, Ltd., were all charged with and convicted of facilitating the distribution of two obscene films. Happy Day was fined \$10,000, and Brown Bear and Combined Entertainment Ventures were each fined \$5,000. Mr. Hollis was fined \$250 and was sentenced to 90 days in jail. Only the conviction of Mr. Hollis is before us here.

Mr. Hollis contends that because "[t]here was no evidence presented that Hollis had ever been inside the Cinema X Theater, or that he had any knowledge of the exhibition or content of the two films in question," it was not shown that he had the necessary scienter. The evidence adduced at trial, however, indicated that Mr. Hollis acted as bookkeeper-management supervisor for the Cinema X operation pursuant to a contract under which Brown Bear had engaged "the services of Hollis to supervise and disburse funds earned from the operation of various enterprises...." The contract, a copy of which was received in evidence, provided that Mr. Hollis was to pay the bills and was

"permitted to . . . hire or discharge any employee whose job it is to handle monies taken in by the aforescribed business enterprises, subject only to the requirement that the local manager of the aforescribed business enterprise must consent to the action taken by Hollis and . . . hire, engage or contract with any accounting firms, business consultants, or individuals in order to insure the successful operation and management of any of

the aforedescribed business
enterprises."

The contract prohibited Hollis from divulging, without the corporation's written consent, "any and all information that may come to his attention, directly or indirectly, resulting from the carrying out of his duties herein, to any person, firm or corporation, including local, state and federal governments"

Also received in evidence was a number of cancelled checks drawn by Mr. Hollis on a Brown Bear account in payment for films bearing titles such as "Hot Honey," "Bad Penny -- Double your Pleasure," "Soft Place," "Other Side Julie," "Hot Lunch," and "Fiona on Fire." (The title of each of the films mentioned was written on the face of the check drawn to pay for that film.) The two films as to which criminal charges were brought here did not have any titles at all; the jury having found the content of the films obscene,¹ this

¹ Both films were shown to the jury. In final argument the prosecutor had this to say
(footnote continued)

untitled material may fairly be characterized as a sort of generic obscenity -- not an inappropriate product, perhaps, to be merchandised at a place named the "Cinema X." (Two other films seized at the same time as the generic films did have titles -- "Candy Goes to Hollywood" and "Erotic Adventures of Candy" -- but the Commonwealth chose not to base any prosecution on them.)

II

In Smith v. California, 361 U.S. 147 (1959), the Supreme Court held that an obscenity statute may not impose liability without proof of scienter. Speaking through

(footnote continued from previous page)
on the issue of obscenity: "Think for a minute, think back to last Friday morning when you were sitting in the Cinema X Theater; think back to the films, . . . think of what you saw. Think of what was portrayed on the screen there, murder, rape, sodomy, sexual intercourse, deviate sexual intercourse, flagellation [sic], numerous and repeated scenes of secretion of semen on the bodies, on the faces, in the mouths of the women in the films. Think of what you saw. I think it's appropriate that the films are contained in trash bags because that's what they are."

Justice Brennan, the Court rejected an argument that a scienter requirement would render all obscenity statutes ineffective: "[e]yewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." Smith, 361 U.S. at 154.

In Hamling v. United States, 418 U.S. 87 (1974), the Court had this to say on the subject of scienter:

"[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of [the statute in question] nor by the constitution.

'Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.' United States v. Wurzbach, 280 U.S. 396, 399 . . . (1930)."

Hamling, 418 U.S. at 123-24.

Applying these principles to the case at hand, we believe that a rational trier of fact could properly have found that Mr. Hollis knew what kind of business Cinema X was engaged in and knew the character and nature of the films he was procuring for Cinema X. He might not have been certain that a Campbell County jury, if called upon to decide the question, would conclude that the two films for which he was prosecuted were obscene, but Mr. Hollis had no reason to assume that any jury would find either that the films were not obscene or that he was unaware of their

character. He may not have been able to write the titles of those particular films on the checks with which he paid for them, the filmmakers apparently having lacked the wit to devise sufficiently suggestive titles, but Mr. Hollis would have been the man to pay for the films, as the jury could have found, because the evidence showed that his was the only authorized signature that appeared on the signature cards for the corporate checking accounts. In the context of the business in which Mr. Hollis was engaged, the very fact that the films were untitled could have been considered significant as far as scienter is concerned.

Mr. Hollis relies on six decision from Texas state courts, the most notable of which are Acevedo v. State, 633 S.W.2d 856 (Tex. Crim. App. 1982), and Skinner v. State, 652 S.W.2d 773 (Tex. Crim. App. 1983). Acevedo is plainly distinguishable from the case at bar because the defendants in that

case were merely theater concessionaires and cashiers; there was no evidence that they had anything whatever to do with the acquisition of an obscene film. The defendant in Skinner was a college student moonlighting as a cashier, concessionaire, and cleaning person at an adult theater. Here again, there was no evidence that the defendant had anything to do with the acquisition of the films exhibited at the theater.

Mr. Hollis was no mere concessionaire. He wrote the checks for the films, and it would not be irrational to find that he knew the nature of the merchandise he was buying. Under Hamling, there was ample evidence on which a rational jury could have found scienter. See Young v. Abrams, 698 F.2d 131 (2d Cir. 1983), where, applying the rationality standard set forth in Jackson v. Virginia, 443 U.S. 307, (1979), the court affirmed a denial of habeas relief in a

factual setting similar to that presented here.

The judgment of the district court is **AFFIRMED**.



No. 86-5311

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOM HOLLIS, JR.	)	FILED
)	
Petitioner-Appellant,	)	OCT 13 1987
)	
vs.	)	JOHN P. HEHMAN,
	)	Clerk
CAMPBELL COUNTY)	
DISTRICT COURT	)	ORDER
)	
Respondent-Appellee,)	

Before: KRUPANSKY, NELSON and RYAN,
Circuit Judges

Upon consideration of the petition for rehearing filed herein by the petitioner-appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE
COURT
John P. Hehman, Clerk

Leonard Green,
Chief Deputy

Supreme Court, U.S.
FILED

FEB 6 1988

JOSEPH F. SPANIOL, JR.
CLERK

(2)
NO. 87-1143

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, 1987

TOM HOLLIS, JR.

Petitioner

versus

CAMPBELL COUNTY (KENTUCKY) DISTRICT COURT

Respondent

RESPONSE IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERIC J. COWAN
ATTORNEY GENERAL

ROBERT V. BULLOCK
ASSISTANT ATTORNEY GENERAL
209 ST. CLAIR STREET
FRANKFORT, KENTUCKY 40601-1875

COUNSEL FOR RESPONDENT

18 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

COUNTERSTATEMENT OF THE QUESTION
PRESENTED FOR REVIEW

IS THERE A BASIS FOR THIS COURT TO REVIEW
WHETHER THE COURT OF APPEALS FOR THE SIXTH
CIRCUIT MISINTERPRETED KENTUCKY LAW ON THE
STANDARD OF PROOF FOR SCIENTER IN AN OBSCENITY
CASE?

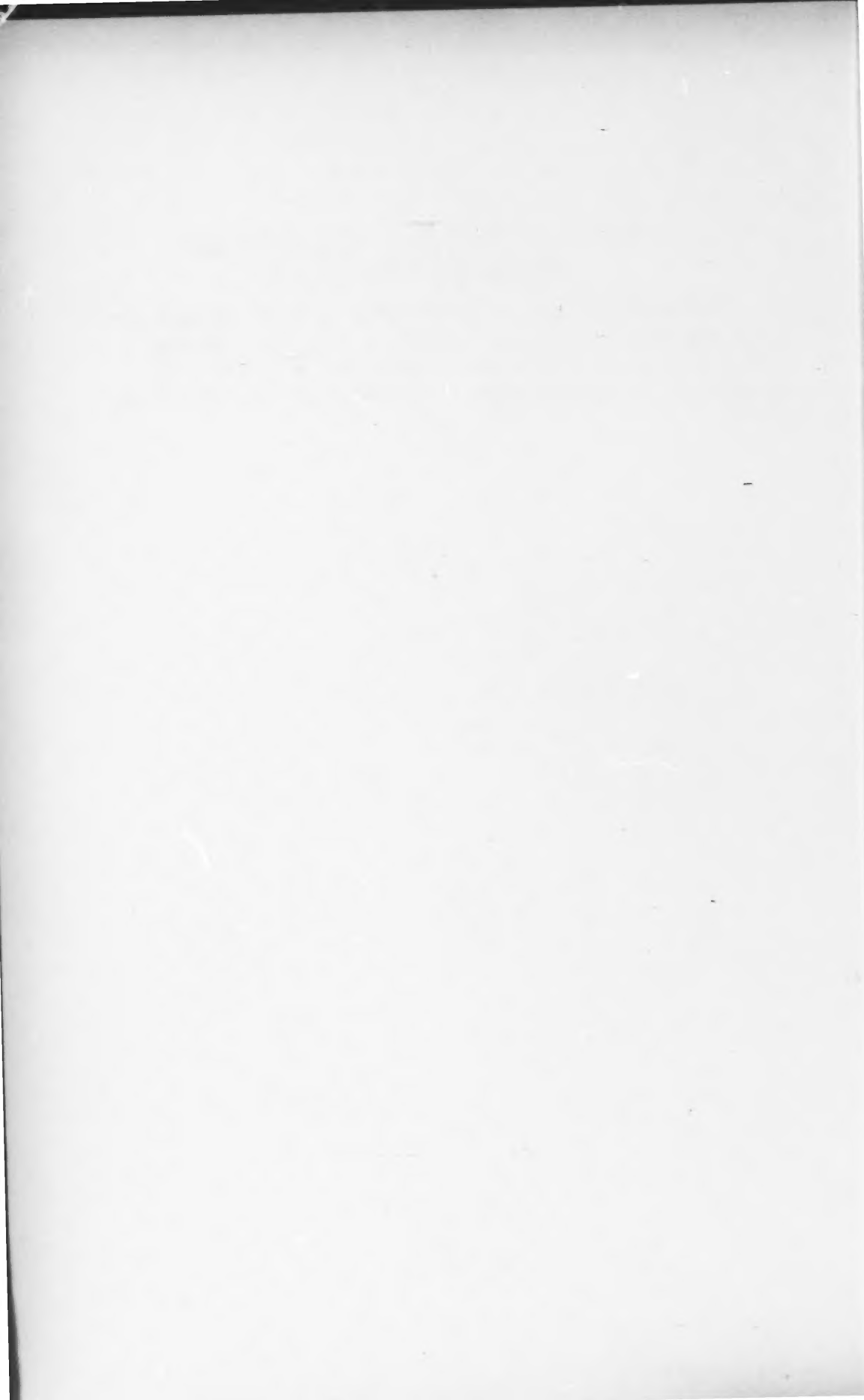


TABLE OF CONTENTS

	<u>Page</u>
COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION INVOLVED.....	1
COUNTERSTATEMENT OF THE CASE.....	2 - 5
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.....	5 -12
I. THERE IS NO REASON FOR THIS COURT TO REVIEW WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT MISINTERPRETED KENTUCKY LAW ON THE STANDARD OF PROOF FOR SCIENTER.....	5 - 8
II. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION.....	8 -12
CONCLUSION.....	12



TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Hamling v. United States,</u> 418 U.S. 87 (1974), 41 L.Ed. 2d 590, 94 S.Ct. 2887.....	6, 7, 8, 11
<u>Keene v. Commonwealth,</u> Ky. 516 S.W.2d 852, 855 (1974).....	6, 7
<u>Loveday v. Davis,</u> 697 F.2d 135 (6th Cir. 1983).....	12
<u>Miller v. California,</u> 413 U.S. 15, 93 S.Ct. 2607 37 L.Ed.2d 419 (1973).....	7
<u>Mishkin v. New York,</u> 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1965).....	8-9
<u>Smith v. California,</u> 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).....	8
28 U.S.C. 1254(1).....	1
<u>United States v. American Theatre Corp.,</u> 526 F.2d 48 (8th Cir. 1975).....	9
<u>United States v. Friedman,</u> 528 F.2d 784 (10th Cir. 1976).....	9
<u>United States v. Marks,</u> 585 F2d 164 (6th Cir. 1978).....	10
<u>United States v. Sandy,</u> 605 F.2d 210 (6th Cir. 1979).....	11



OPINION BELOW

The Per Curium Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming the Order of the District Court denying the Petition for Writ of Habeas Corpus dated September 1, 1987, was correctly set forth in petitioner's appendix.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner contends that the Fifth Amendment to the United States Constitution is involved.



COUNTERSTATEMENT OF THE CASE

After a jury trial in the Campbell County Kentucky District Court, petitioner Tom Hollis, Jr. was found guilty of criminal facilitation and sentenced to 90 days in the county jail plus a \$250 fine.

On July 12, 1980, officers viewed films at the Cinema X Theatre in Newport, Kentucky. There were no titles on the films although they were referred to as "detective movie" and "antique shop movie." Petitioner Tom Hollis was charged with criminal facilitation and other individuals were charged with distribution of obscene matter and criminal facilitation. A sign in the theatre advised that the movies are sexually oriented, sexually explicit and if they offend you, please stay out. The sign further stated that the individual must be 18.



During the trial it was shown that various payroll withholding forms and other documents were signed by petitioner for the company or companies exhibiting the films. Petitioner was the only person to have a signature card for Brown Bear, Inc. and Happy Day, Inc. with the Boone State Bank in Florence, Kentucky. He made deposits for the two corporations.¹

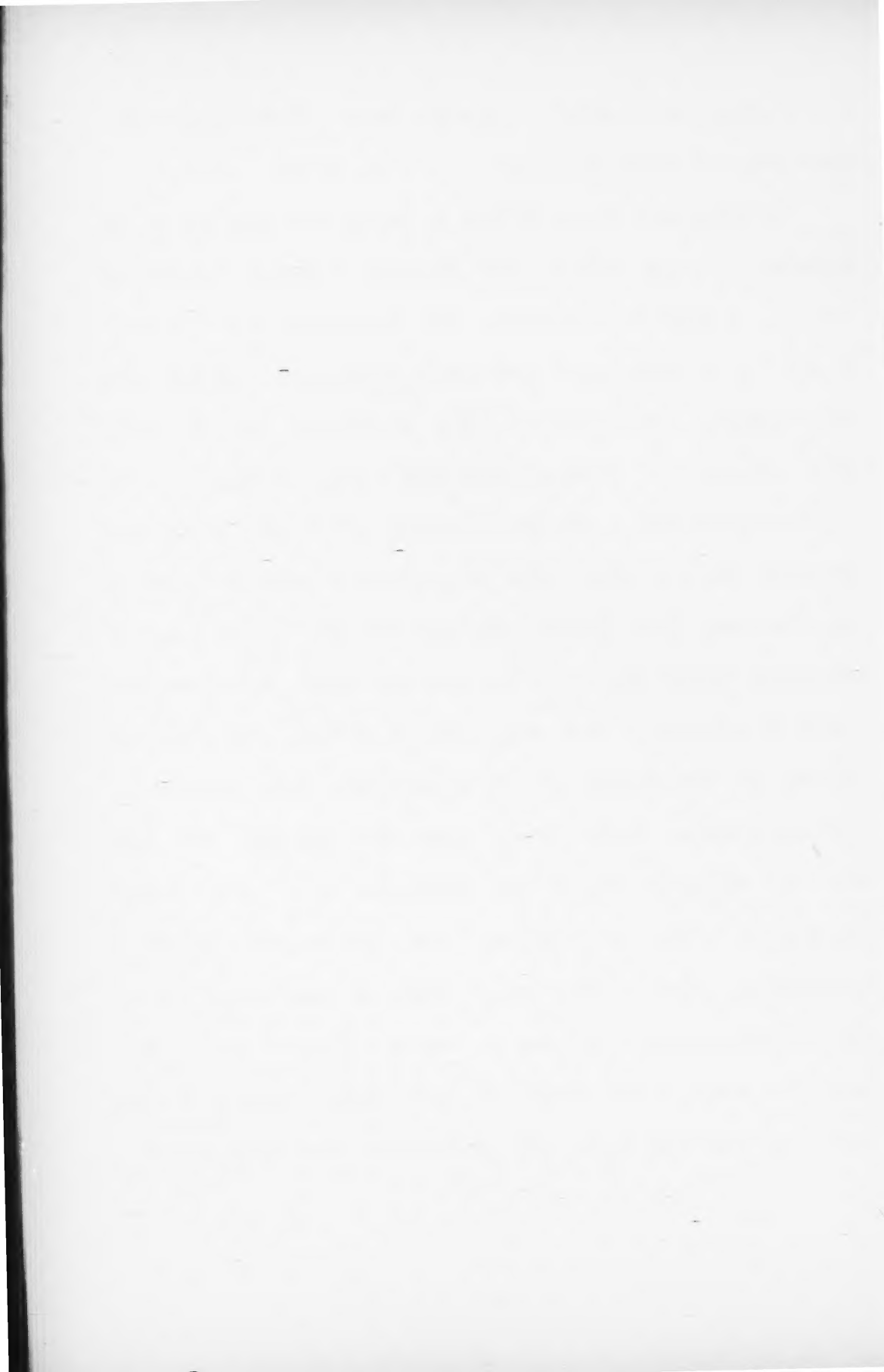
Petitioner appealed from the judgment of the Campbell District Court to the Campbell Circuit Court. On March 9, 1983, the Campbell Circuit Court issued its Findings of Fact, Conclusions of Law and Judgment and affirmed the judgment of the trial court. Petitioner moved for discretionary review with the appellate courts of Kentucky and petitioned for certiorari to the United States Supreme Court. Both the motion

¹Petitioner did not testify in his own behalf; however, with his responsibilities, it is highly unlikely that petitioner had never been in the theatre.



for discretionary review and petition for certiorari were denied.

Petitioner then filed a petition for writ of habeas corpus with the United States District Court, Eastern District of Kentucky at Covington. In a thorough and well-reasoned report the Magistrate recommended the petition be denied. The District Judge adopted the Magistrate's recommendation. In concluding that the petition should be denied, the Magistrate noted that a conviction for facilitation in distribution of obscene material may be based upon circumstantial evidence. The Magistrate noted the various items of evidence which supported the judgment. Petitioner's next move was to appeal to the United States Court of Appeals for the Sixth Circuit. In affirming the District Court's judgment, the court held that a rational trier of fact could properly have found that Mr. Hollis knew what kind of business Cinema X was engaged in and knew the character and nature of



the films he was procuring for Cinema X. Petitioner has now petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION
FOR WRIT OF CERTIORARI

I.

THERE IS NO REASON FOR THIS COURT TO REVIEW WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT MISINTERPRETED KENTUCKY LAW ON THE STANDARD OF PROOF FOR SCIENTER.

The Court of Appeals for the Sixth Circuit has not rendered a decision which is in conflict with the decision of another federal court of appeals on the issue in this matter. Likewise, the Court of Appeals did not decide a federal question in conflict with the Kentucky Supreme Court nor has it departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. (Rule 17.1[a] of the U. S. Supreme



Court Rules.) Furthermore, the Sixth Circuit Court of Appeals did not decide an important question of federal law which had not been, but should be, settled by this Court, nor has it decided a federal question in a way in conflict with applicable decisions of this Court. (Rule 17.1[c] of the U. S. Supreme Court Rules.)

Petitioner maintained that the Court of Appeals (now Supreme Court) of Kentucky required in Keene v. Commonwealth, Ky. 516 S.W.2d 852, 855 (1974) a standard for scienter which exceeds the requirements denoted by this Court in Hamling v. United States, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974). Petitioner has suggested that the Sixth Circuit Court of Appeals and by implication the appellate courts in Kentucky have misapplied the holding of Keene v. Commonwealth, supra., to the facts of this case.

It is elementary that this Court will not review routine decisions of state and federal

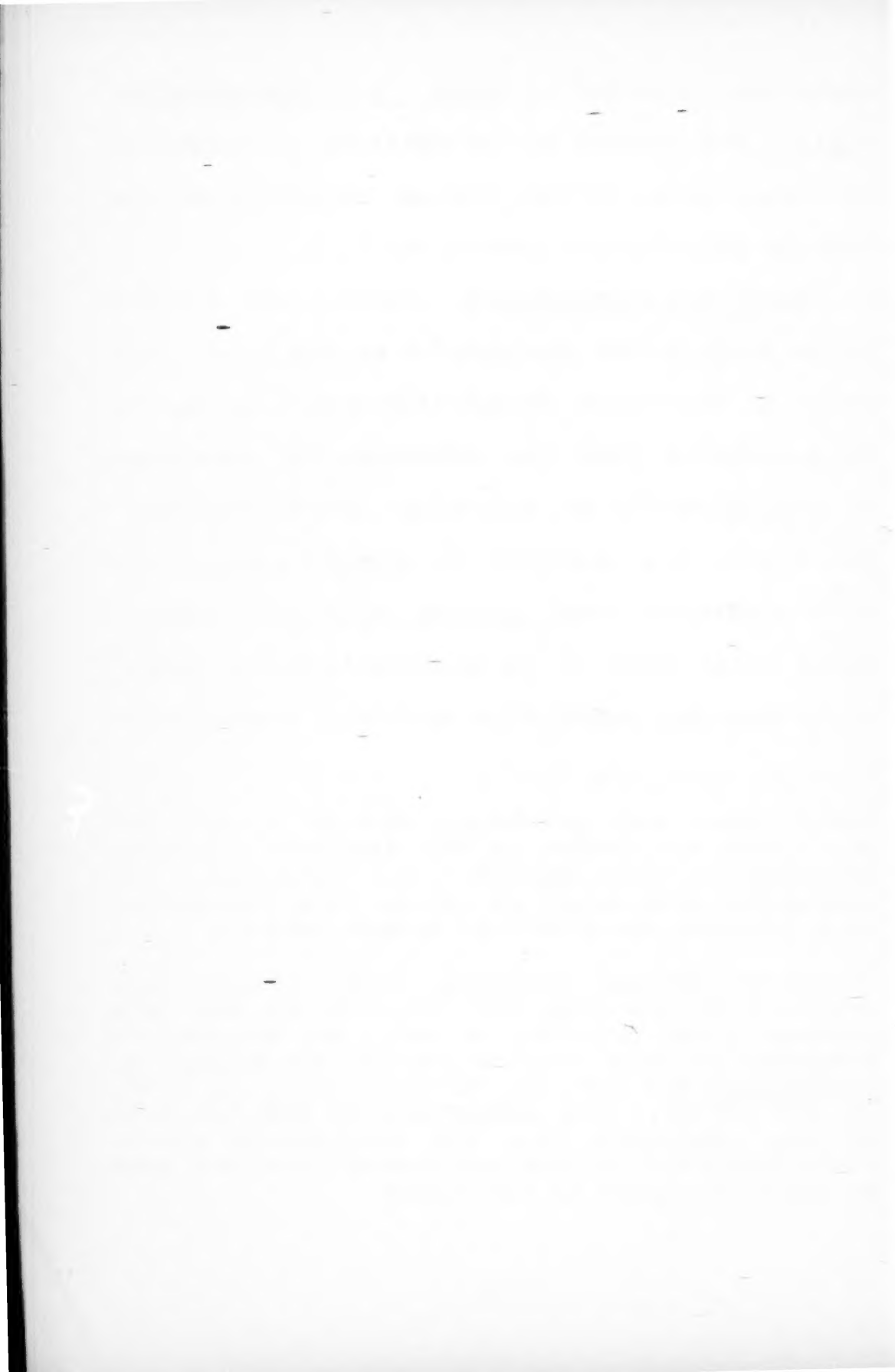


appellate courts.² Keene v. Commonwealth,
supra., was decided by interpreting a statute in
existence prior to the statute in effect at the
time of petitioner's conviction.³

Keene v. Commonwealth, supra., was decided
on an error in an instruction to the jury. The
court in that case stated that the jury was to
be instructed that the defendant had knowledge
of the obscenity of the film. Petitioner sug-
gests that the standard in Keene, supra., was
more stringent than Hamling v. U.S., supra.,
which noted that it is constitutionally suffi-
cient that the prosecution show that a defendant

²This Court had previously denied a writ of
certiorari for review of the Kentucky appellate
decision in this matter. The petitioner now
approaches this court on review from his denial
of a petition for a writ of habeas corpus.

³Kentucky Revised Statutes (KRS) 436.101 was
repealed at the time KRS 531.010, et seq. was
enacted. KRS 531.010, et seq. was enacted in
response to this Court's ruling in Miller v.
California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.
2d 419 (1973). The commentary to KRS 531.010,
et seq. indicates that the substantive provi-
sions contained in the new statute are the same
as those contained in the former.



had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. It is ludicrous to suggest that this Court review the question of whether an obscure passage in a Kentucky decision involving jury instructions set a more stringent standard for scienter than required by this Court in Hamling, supra. This Court should not be involved with such trivia.

II.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION.

Petitioner has claimed that the evidence was not sufficient to support the conviction. There is no need under the scienter requirement to show that petitioner actually viewed the films in their entirety but merely that petitioner knew the general nature and character of the films. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), Mishkin v. New



York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1965), United States v. American Theatre Corporation, 526 F.2d 48 (8th Cir. 1975), United States v. Friedman, 528 F.2d 784 (10th Cir. 1976). There was sufficient evidence for the jury to conclude that petitioner was aware of the general nature and character of the films.

Pursuant to a contract entered into by petitioner and Brown Bear, Inc., which operated the Cinema X Theatre, petitioner was to supervise and disburse funds earned from the operation of the various enterprises operated by the corporation, pay bills, taxes or other assessments concerning the business operation, hire or discharge any employee subject only to the requirement that the local manager of the enterprise must consent to the action taken, and hire, engage or contract with any accounting firms, business consultants or individuals in order to insure the successful operation and management of the business enterprises. In carrying out these functions, petitioner wrote checks for the



normal business expenses such as utilities, etc., but also wrote checks to Entertainment World, Inc., for what was apparently the rental of films such as "Hot Lunch" (check No. 1560), "Hot Honey" (check No. 1558), "Bad Penny-Double Your Pleasure" (check Nos. 1575 and 1585), and "Soft Places" and "Other Side Julie" (check No. 1559).

In addition to the above, it should be noted that Brown Bear, Inc., d/b/a Cinema X, was convicted of distribution of obscene matter in the Campbell Circuit Court on May 22, 1978. In the reported case of United States v. Marks, 585 F.2d 164 (6th Cir. 1978),⁴ the prior owners of Cinema X were convicted of transporting an obscene film, "Deep Throat," to the Cinema X in violation of federal statutes. (That conviction was overturned on an unrelated Bruton issue.)

⁴It should be noted that petitioner wrote a check to Stanley Marks in the amount of \$1700 on or about July 25, 1980 (check No. 776).

The name of the theatre, "Cinema X," suggests that X-rated and therefore obscene films were being shown. As noted by the court in United States v. Sandy, 605 F.2d 210 (6th Cir. 1979):

"The finder of fact, whether trial judge or jury, is not obliged to lay aside his general knowledge of life in evaluating the evidence. . . ."

While it might be suggested that some X-rated films may not be obscene, it asks too much of credibility to expect that under the circumstances petitioner would not have known the general nature and character of the films even though there may not have been any proof that he actually viewed the films. U.S. v. Sandy, id.⁵

In discussing scienter in the mailing of obscene materials the Supreme Court stated in Hamling v. United States, 418 U.S. 87, 124, 41 L.Ed.2d 590, 625, 94 S.Ct. 2887 (1974):

⁵Furthermore, the sign in the theatre restricting admittance to patrons over 18 indicates that sexually explicit material was being shown.

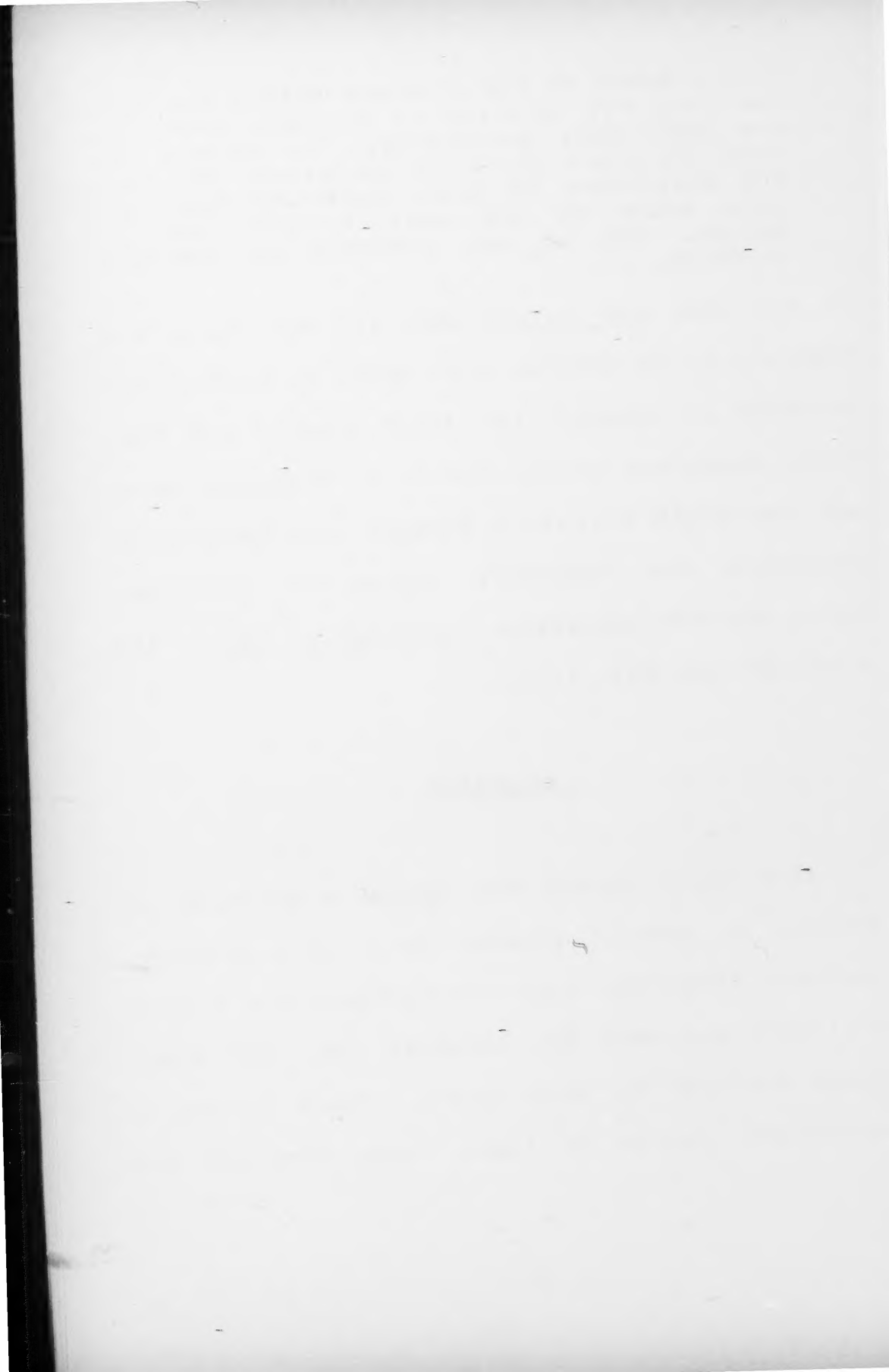


". . . Based on the evidence before it, the jury was entitled to conclude that the individual petitioners, as corporate officials directly concerned with the activities of their organizations, were aware of the mail solicitation scheme, and of the contents of the brochure. . . . "

In the case sub judice when all the facts are tallied, it is obvious that there is substantial evidence to support the trial court, the Kentucky appellate court, the U. S. District Court and the Sixth Circuit's finding that petitioner possessed the necessary degree of scienter. Error was not committed. Loveday v. Davis, 697 F.2d 135 (6th Cir. 1983).

CONCLUSION

This Court should not review a question of whether an obscure passage in a 1974 Kentucky decision involving jury instructions set a more stringent standard for scienter than the standards outlined by this Court. There is not a sufficient public or legal issue involved for

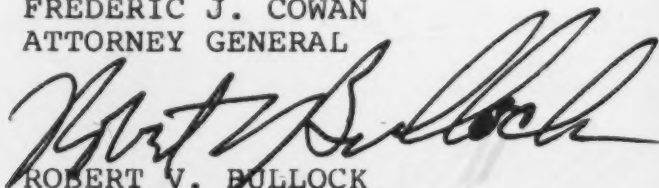


this Court to review the decision of the Court of Appeals for the Sixth Circuit. The decision of that court was factually and legally correct.

For the reasons stated above, the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

FREDERIC J. COWAN
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "Robert V. Bullock", written in a cursive style.

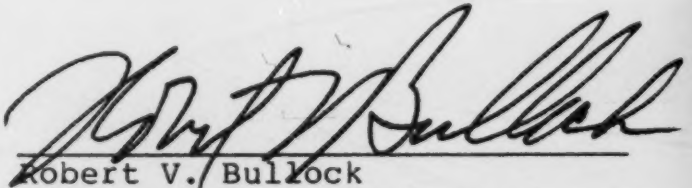
ROBERT V. BULLOCK
ASSISTANT ATTORNEY GENERAL
209 St. Clair Street
Frankfort, KY 40601-1875
(502) 564-2200

COUNSEL FOR RESPONDENT
MEMBER OF THE BAR OF THE
UNITED STATES SUPREME COURT



CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT have been mailed, Unites States Postage prepaid, to Hon. C. Thomas Hectus, 635 West Main Street, Fourth Floor, Louisville, Kentucky 40202, this the 5th day of February, 1988.

A handwritten signature in dark ink, appearing to read "Robert V. Bullock", written over a horizontal line.

Robert V. Bullock
Assistant Attorney General